No. 83-1786

IN THE

Supreme Court of the United States

October Term, 1983

OBED AARSVOLD; BARRY BANKS; LAURENCE BEAUCHENE; RALPH BELL; MELVIN BIER; WARREN BLESI; EPPIE BOOKER, as Trustee of the Estate of Ulysses Booker, Jr., deceased; MARY BROCKMAN; ROBERT BURSCH; HAROLD CHRISTIANSEN; MAUREEN GODAR; DOROTHY HAAPALA; GERALD HAMMER; ALBERT HARVEY; MARINA HAYDON; ANDREW HJELMELAND; JOHN HOGAN; RICKY JOHNSON; JOSEPH JORDAHL; CHARLES KOBOW; JOHN KNODEL; CURTIS LARSON; LEROY LARSON; WILLIAM LOVEGREN; ROBERT MAYER; GREGORY McROY; RODNEY NORTON; CHRISTOPHER NOWICKI; BURTIN OLSON; RANDAL PEDERSON; MICHAEL POWELL; GARY RECK; FRANK REHDER; RICHARD ROSSINI; MICHAEL SERAFIN; VINCENT SHEPARD; ELIZABETH SIVANICH; GREGORY SMITH; EUGENE THEISEN; MICHAEL TOMASCAK; PETER TOMASCAK; ED TYTUS; EMMAL UNDERWOOD; JEFFREY VARNEY,

Petitioners,

vs.

GREYHOUND LINES, INC.; AMALGAMATED TRANSIT UNION; and AMALGAMATED TRANSIT UNION, DIVISION 1150,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROGER A. JENSEN
PETERSON, BELL & CONVERSE
1800 American National Bank Building
St. Paul, Minnesota 55101
(612) 224-4703
Attorneys for Respondent Amalgamated Transit Union

EARL W. PUTNAM
AMALGAMATED TRANSIT UNION
5025 Washington Avenue N.W.
Washington, D. C. 20016
(202) 537-1645
Attorneys for Respondent Amalgamated Transit Union

224-7631 — Review Publishing Co., 257 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTIONS PRESENTED

Petitioners pose three questions in their Petition for Writ of Certiorari:

1. Whether the six month statute should be tolled pending a hypothetical arbitration date since this case never went to arbitration;

2. Whether the six month statute of limitations should be tolled during the period several of the employees' unfair labor practice charges were being investigated by the National Labor Relations Board; and

3. Whether the *DelCostello/Flowers* decisions should be applied retroactively.

This brief in opposition to certiorari being granted limits itself to the last issue, that is, the issue of retroactive application of the *DelCostello/Flowers* decisions, which is the only issue where there is a split in circuits and which has an impact beyond the facts of this particular case.

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Respondent, Amalgamated Transit Union, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 724 F.2d 73.

STATEMENT OF CASE

Petitioners were all employees of Greyhound Lines, Inc., and were members of Division 1150 of the Amalgamated Transit Workers Union. They were discharged from their employment by Greyhound in December 1980 for participating in a strike which was in violation of the no strike clause of the collective bargaining agreement between Greyhound and the Union at Greyhound's Minneapolis, Minnesota, terminal.

The collective bargaining agreement between the Union and Greyhound provided a very typical multi-step grievance procedure. The first step of the grievance procedure is the presentation of the written grievance to a supervisor designated by the Employer. If not resolved, the second step is an appeal to a regional vice president or his representative for a written decision. If the matter is not satisfactorily resolved at the regional vice president's level, then, within forty-five days of the regional vice president's decision, the matter may be appealed by the Union to final and binding arbitration. Each of the steps requires action to be taken by the Union within a set period of time and, if that action is not taken, the effect is that the last step Employer response is deemed to be "final and binding" on the parties.

After the terminations, timely grievances were filed protesting the discharges of the employees. Hearings were held on the grievances before the regional vice president's representative in accordance with the second step of the grievance procedure. Those hearings were held on January 14, 15, and 16, 1981, and a representative of the local Union appeared at each of the hearings to represent the employees. Written decisions were issued by the representative upholding each of the discharges between January 15 and January 23, 1981.

The matter was then referred back to the local Union membership for a decision on whether or not the case should be appealed to arbitration. A membership vote was taken, pursuant to the Union Constitution requiring such a vote, at which vote the appellants participated along with other Union members. A majority of the membership voted not to appeal the case to arbitration. The discharged employees were advised of the results of the membership vote on March 13, 1981, and it was that date the Circuit Court concluded that the cause of action accrued.

Several of the employees then filed charges with the National Labor Relations Board against the Union and Greyhound between March and May, 1981. The Regional Director of the National Labor Relations Board, Eighteenth Region, refused to issue a complaint against Greyhound or the Union and the decision was affirmed by the General Counsel of the National Labor Relations Board on July 21, 1981. A request for reconsideration was denied on August 19, 1981.

This action was commenced by the appellant in the Minnesota State Courts on November 24, 1981. The matter was removed to the United States District Court, District of Minnesota, in December, 1981.

Each of the defendants moved for summary judgment claiming the ninety day statute of limitations established by the Supreme Court in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), decided by this Court on April 20, 1981, had run prior to the commencement of the action. United States District Court Judge Harry H. MacLaughlin granted the summary judgment motions of the three respondents, dismissing the employees' claim.

After the District Court's decision and before a decision on the appeal to the Eighth Circuit was made, this Court mod-

ified its previous ruling with regard to the statute of limitations in duty of fair representation cases in *DelCostello v. International Brotherhood of Teamsters*, —— U.S. ——, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983); and *United Steelworkers of America v. Flowers*, —— U.S. ——, 103 S.Ct. 2281, 76 L.Ed.2d 746 (1983), applying the six month statute of limitations provided for in Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b). The Eighth Circuit Court of Appeals affirmed the District Court's decision, dismissing the employees' claims against Greyhound and the Unions, relying upon the *DelCostello/Flowers* decisions by applying them retroactively.

REASONS WHY THE WRIT SHOULD BE DENIED

Eighth Circuit Fully And Correctly Decided Issue

Despite the brevity of the Eighth Circuit's decision, it fully and correctly decided the issue and retroactively applied the *DelCostello v. International Brotherhood of Teamsters*, —— U.S. ——, 103 S.Ct. 2281, 76 L.Ed.2d 746 (1983), decision to apply the Section 10(b) of the Labor Management Relations Act, 29 U.S.C. Section 160(b), statute of limitations to duty of fair representation cases.

The Eighth Circuit relied on its recent decision in *Lincoln v. IAM District Lodge 9*, 723 F.2d 627 (8th Cir., 1983). In *Lincoln*, the Eighth Circuit applied a three-factor test to be used in determining whether or not a new case dealing with statutes of limitations should be applied retroactively, as established by this Court in *Chevron Oil v. Huson*, 404 U.S. 97, 106-07 (1971):

1. Whether a new principle of law is established;
2. Whether a retroactive application will further or retard the operation of the rule; and
3. Whether retroactive application will produce substantial inequitable results.

Concerning the first factor, the Eighth Circuit properly concluded that the *DelCostello* decision was not a clear break from prior law and that "prior notice of a shorter period" was given by the Supreme Court in *United Parcel Services v. Mitchell*, 451 U.S. 56 (1981).

In *Mitchell*, the state's Uniform Arbitration Act ninety day statute of limitations was adopted by this Court. In his concurring opinion, Justice Stewart suggested that the six month limitation period provided in Section 10(b) of the Labor Management Relations Act be applied. The *Mitchell* decision came down on April 20, 1981, but appellant waited until November 24, 1981, to bring this action.

Petitioners, therefore, had ample notice that the statute of limitations applicable to duty of fair representation cases had been shortened considerably to ninety days based upon the majority decision in *Mitchell*, and, at the very most, six months based upon Justice Stewart's concurring opinion.

It should also be noted that in a footnote to her dissenting opinion in the *DelCostello* case, Justice O'Connor endorsed retroactive application of *Mitchell* because it was not a "clear break" with past law.

The second factor regarding whether retroactive application of the rule would further operation of the rule was also properly answered in the affirmative. Part of this Court's rationale for adopting the shorter limitations period was to

bring about a relatively rapid resolution of labor disputes which this Court and the Congress have, on a number of occasions, declared to be the national labor policy. Application of the six month statute, rather than the Minnesota six year statute of limitations for tort and contract actions, advances that federal labor policy.

The last factor dealing with the equities of the retroactive application has also been satisfied. Under *Mitchell*, appellants had only ninety days to commence their action. *DelCostello* doubled that time to six months, expanding the time during which the employees could have brought their action by a factor of two.

In at least two cases from other Circuits (*Hand v. Chemical Workers*, 712 F.2d 1350 (11th Cir., 1983); and *Storck v. Teamsters Local 600*, 712 F.2d 1194 (7th Cir., 1983)) the retroactive application of the six month *DelCostello* rule salvaged cases for plaintiff employees where they otherwise would have been time-barred.

In those cases, the employees brought their actions between ninety days and six months of the accrual of their causes of action. By the retroactive application of the six month statute, their claims which would have been time barred under the ninety day statute, were not time barred under the six month statute.

If the facts of this case were somewhat different and petitioners had brought their action between ninety days and six months of the accrual of their cause of action, we no doubt would be hearing the same petitioners urging retroactive application of the six month period to avoid the dismissal of their case by the District Court based upon the ninety day statute provided for by *Mitchell*.

Thus, all of the factors of *Chevron* have been satisfied and the Eighth Circuit's decision properly applied *DelCostello* retroactively.

It should also be noted that, in addition to the Eighth Circuit's retroactive application of *DelCostello*, the Third, Seventh, and Eleventh Circuits have applied *DelCostello* retroactively in *Perez v. Dana Corp. and Steelworkers*, 718 F.2d 581 (3rd Cir., 1983); *Storck v. Teamsters Local 600*, 712 F.2d 1194 (7th Cir., 1983); and, *Hand v. Chemical Workers*, 712 F.2d 1350 (11th Cir., 1983), after applying the *Chevron* test.

Only the Ninth Circuit in *Edwards v. Teamsters Local 36*, 719 F.2d 1036 (9th Cir., 1983), refused to apply *DelCostello* retroactively. There, in making a *Chevron* analysis, the Ninth Circuit concluded, we believe incorrectly, that *Mitchell* did not "clearly foreshadow" *DelCostello*. To the contrary, as we have suggested previously, *Mitchell* clearly put petitioners on notice that a reduced limitation period was going to be applied to duty of fair representation cases and, as we have stated previously, Justice Stewart's concurring opinion specifically suggested that the 10(b) six month statute of limitations be adopted.

Finally, the Ninth Circuit concluded that retroactive application of the rule would produce an inequity for plaintiffs. In the context of that particular factual setting, such a conclusion is understandable. But application of the rule to the broad spectrum must be considered. Examination of the broad spectrum of such duty of fair representation cases produces examples where retroactive application will both bar claims and salvage claims which would otherwise be barred under *Mitchell*. With such an overall view in mind, retroactive application is not inequitable, but is fair, reasonable, and consistent.

CONCLUSION

For the reasons set forth above, the Amalgamated Transit Workers Union respectfully requests that certiorari not be granted in this case.

Respectfully submitted,

ROGER A. JENSEN
PETERSON, BELL & CONVERSE
and
EARL W. PUTNAM
AMALGAMATED TRANSIT UNION
Attorneys for Amalgamated Transit Union